PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
MAR 1 1972
CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ---------- 71-1009

HERBERT LOYD LINDAUER,
Petitioner,

VERSUS

The OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH and HARVEY EVEREST,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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The OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH and HARVEY EVEREST,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, above-named, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding.

OPINIONS BELOW

The Tenth Circuit Court's opinion is set forth in full in the Appendix attached hereto and marked "Appendix "A."

The Order denying Petition for Rehearing was entered on January 10, 1972.

The Judgment of the United States District Court for the Western District of the State of Oklahoma is reprinted and attached as Appendix "B."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The pertinent question presented is whether the statutes of Oklahoma, being Title 11, Oklahoma Statutes Annotated, Articles 1601-20, 1651-70, and 1701-18, are constitutional and whether the District Court for the Western District of Oklahoma committed error in failing to convene a Three-Judge Court as provided by 28 U.S.C. §§ 2281 and 2284.

The Petitioner had sought to enjoin the enforcement of the Oklahoma statute above-quoted on the ground that the provisions of such statute denied equal rights or franchise to certain Oklahoma citizens, including Appellant thereby perpetrating an invidious violation of the equal protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The Petitioner-Appellant, Herbert Loyd Lindauer, filed an action in the United States District Court for the Western District of Oklahoma, seeking to have declared unconstitutional the Urban Renewal Act, which is found in Title 11, Oklahoma Statutes Annotated, Articles 1601-20, 1651-70, and 1701-18.

This was presented on the ground and upon the theory that this Act of the Oklahoma Legislature deprived the petitioner of equal protection of the law under the Fourteenth Amendment in that Oklahoma City is a city of more

than 100,000 population and under this Act, the City Council passed upon the question of Urban Renewal, while in a city of 100,000 or less population, under this Act, the people had the right to vote and determine whether or not they would come under and adopt the Urban Renewal as provided in the statute.

Therefore, the petitioner in this case presents to the Court the question of whether or not a state can discriminate against a citizen and take away his right to vote on an important question and grant to a citizen in a smaller populated city of 100,000 or less, the right to vote.

ARGUMENT AND AUTHORITIES

We think that the Court should consider that the petitioner, Herbert Loyd Lindauer, is being deprived of his property because the Urban Renewal Authority is attempting to take it for public use under Oklahoma Statutory authority to act through its City Council without a vote of the people. There are only two counties in Oklahoma with a population in excess of 100,000, they being Oklahoma County, in which Oklahoma City is located, and Tulsa County, in which Tulsa is located. All the citizens in other parts of the State of Oklahoma, residing in cities, have the right to, and of course do, exercise their rights to vote on the question of Urban Renewal.

Petitioner believes that the right to vote is sacred and that there should be no discrimination on account of the city in which one lives.

Without citing the cases, this Court has numerous times held that the right to vote has been abused and citizens have been denied that right on account of race. These

cases all hold that this is a denial of a constitutional right. We deem it unnecessary to call to the Court's attention a large number of cases and we think that to call this Court's attention to the case of *Charles W. Baker, et al., Appellants v. Joe C. Carr, et al.*, decided March 26, 1962, found in 82 Sup.Ct. 691, 369 U.S. 186, answers all the questions that argument could answer in this case and it involves the right to vote, which is denied to citizens under the Urban Renewal Act above-quoted.

We copy for the benefit of the Court, only certain paragraphs of the syllabus in this case, as follows:

"9. *Courts* 299 (3)

"Federal district court had jurisdiction of subject matter of complaint by certain Tennessee citizens alleging that a state statute effected an apportionment that deprived them of equal protection of the laws in violation of the Fourteenth Amendment, under the judicial-power article of the Federal Constitution, and under statute providing district courts shall have original jurisdiction of any civil action to redress deprivation of any right secured by the Federal Constitution. U.S.C.A. Const. art. 3, § 2; Amend. 14; 28 U.S.C.A. § 1343; Acts Tenn. 1901, c. 122.

"12. *Constitutional Law* 42

"Residents of certain counties in the state, allegedly qualified to vote for members of the General Assembly representing counties in which they resided, suing on their own behalf and on behalf of all qualified voters of their respective counties and in behalf of all voters of the state similarly situated, had standing to maintain a suit in federal court for a declaration that a state statute effected an apportionment that deprived plaintiffs of equal protection. U.S.C.A. Const. Amend. 14; Acts Tenn. 1901 c. 122.

"13. *Constitutional Law* 211.

"A citizen's right to vote free of arbitrary impairment by state action is a right secured by the Federal Constitution if such impairment results from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box, U.S.C.A. Const. Amend. 14.

"16. *Constitutional Law* 68 (3)

"Claim of certain state voters that they were being denied equal protection was justiciable, and if discrimination was sufficiently shown, right to relief under the equal-protection clause was not diminished by fact that the discrimination related to political rights. U.S.C.A. Const. Amend. 14."

The present election laws of the State of Oklahoma are found in Title 26, Oklahoma Statutes Annotated, and in the Cumulative pocket parts for use in 1970-1971, Section 93.2 of said pocket parts as follows:

"The word 'elections' as used in this Act is here declared to mean every general, primary, runoff primary, regular or special election held in this State, or in any county, city, town, township or precinct for the nomination or election of Federal, State, district, county, municipal or township officers or upon any issue submitted to the people of the State or any municipality or subdivision of the State."

The Supreme Court of the State of Oklahoma in the case of *Hines* v. *Winters*, 320 P.2d, beginning on page 1114, said that the qualification of electors was fixed by unambiguous provisions of the Constitution and statutory law and the common law affords no aid in proper interpretation of the Constitution and statutes relating to electors.

The Constitution of the State of Oklahoma fixes the right to vote in Oklahoma, being Article I, Federal Relations, page 593, as follows:

"Section 1. *Supreme law of land*

"The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article II, of the Constitution of the State of Oklahoma, Bill of Rights, page 616, is as follows:

"Section 4. *Interference with right of suffrage*

"No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage by those entitled to such right."

"Section 7. *Due process of law*

"No person shall be deprived of life, liberty, or property, without due process of law."

Article III, of the Constitution of the State of Oklahoma, Suffrage, in General, page 946, is as follows:

"Section 1. *Qualifications of electors—Persons disqualified*

"Qualified electors of this State shall be citizens of the United States, citizens of the State, including persons of Indian descent, (native of the United States), who are over the age of twenty-one years and who have resided in the State one year, in the county six months, and in the election precinct thirty days next preceding the election at which such elector offers to vote."

Amendment 14, page 984, of the Constitution of the United States is as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment 15, page 986, of the Constitution of the United States is as follows:

"Section 1: The right of the citizens of the United States shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Amendment 19, of the Constitution of the United States, page 988, is as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

CONCLUSION

The Petitioner therefore feels that there is no legal, just or equitable right or reason why he should be denied the right to vote upon the question of whether Urban Renewal shall be adopted in Oklahoma City, merely because Oklahoma City is a city of more than 100,000 population.

The granting of this right to vote to a citizen in a city of 100,000 population or less certainly constitutes a discrimination and denies to this Petitioner his constitutional rights under the Constitution of the State of Oklahoma and the Constitution of the United States.

Petitioner, therefore, most respectfully petitions this Court to grant a Writ of Certiorari in this cause and to reverse, vacate and set aside the opinion of the United States Court of Appeals, Tenth Circuit, and direct and order the Judgment of the United States District Court for the Western District of Oklahoma to be vacated and a judgment entered, decreeing and declaring the Urban Renewal Act unconstitutional and void.

Respectfully submitted,

JOHN B. OGDEN
Suite 1412
City National Bank Tower
Oklahoma City, Oklahoma 73102
Counsel for Petitioner,
Herbert Loyd Lindauer

February, 1972

CERTIFICATE OF MAILING

I, JOHN B. OGDEN, Counsel for Petitioner, do hereby certify that I have this _____ day of February, 1972, duly served a copy of the foregoing copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on the following Counsel for Respondents:

Messrs. James D. Batchelor,
Jerry L. Salyer, and
John W. Swinford, Jr., Esquires
15 N. Robinson, Suite 506
Oklahoma City, Oklahoma 73102

by mailing a true and correct copy thereof to said Counsel for Respondents, on this the _____ day of February, 1972.

JOHN B. OGDEN,
Counsel for Petitioner,
Herbert Loyd Lindauer.

APPENDIX "A"

FILED
United States Court of Appeals
Tenth Circuit
Dec. 2, 1971
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER, 1971, TERM

HERBERT LOYD LINDAUER, Plaintiff, Appellant,	)	
v.	)	No. 71-1045
THE OKLAHOMA CITY UBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH, and HARVEY EVEREST, Defendants, Appellees.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA
(District Court No. 70-244)

Ted R. Fisher, Tulsa, Oklahoma, for Appellant.

James D. Batchelor and Jerry L. Salyer (Barry W. Johnson, John W. Swinford, Jr. and Harry H. Selph II, on the brief), Oklahoma City, Oklahoma, for Appellees.

Before LEWIS, HAMLEY* and HILL, United States Circuit Judges.

HILL, Circuit Judge.

* Of the Ninth Circuit, sitting by designation.

[APPENDIX]

This is an appeal from the order of the United States District Court for the Western District of Oklahoma denying the application of the appellant to convene a three-judge court, as provided by 28 U.S.C. §§ 2281 and 2284, for failure to show a substantial federal constitutional question, and dismissing the action for failure to state a claim upon which relief might be granted. Appellant had sought to enjoin enforcement of Oklahoma statutes pertaining to urban renewal,[1] alleging that the provisions of such statutes denied equal rights of franchise to certain Oklahoma citizens, including appellant, thereby perpetrating an invidious discrimination violative of the equal protection clause of the Fourteenth Amendment. The statutes in question created an urban renewal authority for cities having a population in excess of 100,000 (Oklahoma City and Tulsa being the only such cities), while no such authority could be created for cities and towns with a population of 100,000 or under without approval by the voters of the given municipality. The district court found the statutes in question to be constitutional.

Appellant argues that there is a proper basis for invoking the jurisdiction of a three-judge court; the complaint presents a substantial federal constitutional question; and the district court to which the application is addressed cannot pass on the merits of the complaint. Appellees contend that there is no basis for convening a three-judge court, as no substantial federal constitutional question is raised. The issue thus presented is whether a substantial federal constitutional question is presented by appellant's complaint.

It is well established that many statutory classifications may be created which do not violate equal protection. Only invidious discrimination offends the United States Constitution. Ferguson v. Skrupa, 372 U.S. 726 (1963). If a rational relationship between the classification and the attainment of a valid public purpose exists, the enactment will be sustained. Williamson v. Lee Optical of Okla., Inc.,

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[1] 11 O.S.A. §§ 1601-20, 1651-70, 1701-18.

348 U.S. 483 (1955); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927). Application of a law to a locality of a particular population classification is not invalid unless the classification is purely arbitrary, oppressive or capricious. Packard v. Banton, 264 U.S. 140 (1924); Hayes v. Missouri, 120 U.S. 68 (1887). The allegation that the Oklahoma Urban Redevelopment Law violates the equal protection clause of the Fourteenth Amendment poses no substantial federal question. It is clear that blight and deterioration exist in heavily populated areas. The Oklahoma legislature's decision to use its police power to attack the problems of the larger cities first does not lack rational justification. Consequently, there is no real issue as to the constitutionality of the population classification.[2] It is worthy of note that an attack on the same statutes in the courts of Oklahoma, wherein violations of the Oklahoma constitution and the Fourteenth Amendment of the United States Constitution were alleged, was rejected by the Oklahoma Supreme Court. Isaacs v. Oklahoma City, 437 P.2d 229 (1966), *cert. denied* 389 U.S. 825.

The question of the constitutionality of a statute must be substantial before there is a right to a three-judge panel. Bailey v. Patterson, 369 U.S. 31 (1962). The district judge to whom the application for a three-judge court is addressed may dismiss a complaint which fails to raise a substantial federal question.[3] As no substantial federal question is presented, the district court properly dismissed the complaint.[4]

Affirmed.

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[2] *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); State ex rel. Fatzer v. Urban Renewal Agency of Kansas City, 296 P.2d 656 (1956).

[3] White v. Gates, 253 F.2d 868 (D.C. Cir. 1958), *cert. denied* 356 U.S. 973.

[4] Taggart v. City of Grand Prairie, 421 F.2d 1301 (5th Cir. 1970); Castle v. Haines, 226 F.2d 591 (7th Cir. 1955), *cert. denied* 350 U.S. 1014; Landsberger v. Freeman, 217 F.Supp. 138 (D.D.C. 1963); Voege v. Am. Sumatra Tobacco Corp., 192 F.Supp. 689 (D.Del. 1961); Bunce v. Williams, 159 F.Supp. 325 (E.D. Mich. 1958).

APPENDIX "B"

FILED
Dec. 11, 1970
REX D. HAWKS
Clerk, U. S. District Court
By VERA EDDLEMAN
Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

HERBERT LOYD LINDAUER, Plaintiff,	)	
vs.	)	No. 70-244 Civil
THE OKLAHOMA CITY URBAN RENEWAL AUTHORITY, a Public Body Corporate, and its Board of Commissioners composed of W. M. HARRISON, F. D. MOON, R. A. HUNTER, JIM LOOKABAUGH, and HARVEY EVEREST, Defendants.	)	

MEMORANDUM OPINION

In this case, Plaintiff claims that Title 11, Oklahoma Statutes, Sections 1601 to 1620 inclusive (the Oklahoma Urban Development Law for cities of over 100,000 population) are unconstitutional and that their enforcement against him in taking certain properties situated in Oklahoma City, Oklahoma and belonging to him denies him the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. In this connection, it is Plaintiff's contention that the above laws do not afford the citizens of Oklahoma City, Oklahoma the right to vote on the exercise of the authority or powers of the Urban Renewal Authority (the exercise of said authority or powers is left to the local governing body of Okla-

homa City) whereas, both Title 11, Oklahoma Statutes, Sections 1651 to 1670 inclusive (the Oklahoma Urban Development Act for cities of 10,000 to 100,000) and Title 11, Oklahoma Statutes, Sections 1701 to 1718 inclusive (the Oklahoma Urban Development Act of 1961 for cities of 10,000 or less) provide that before the exercise of the authority or powers of the Urban Renewal Authority, the approval thereof shall be by resolution of the local governing board of the city involved *and* a majority vote of the qualified property tax paying voters of the city at an election held for that purpose. Thus, Plaintiff complains that he has no vote as a citizen of Oklahoma City (which has a population of over 100,000) but that citizens of other cities in Oklahoma with a population below 100,000 have a vote as to whether the authority and powers of the Urban Renewal Authority shall be exercised.

Plaintiff applied to the Court for the creation of a three-judge court under the provisions of 28 U.S.C. 2281 et seq. The Court denied the application by an Order filed herein on May 20, 1970, which by reference is made a part of this Memorandum Opinion. Plaintiff's appeal of this Order has been dismissed for lack of jurisdiction by the United States Court of Appeals for the Tenth Circuit under date of November 24, 1970. At the pretrial conference conducted herein on September 4, 1970, the parties stipulated and agreed that the case on its merits was submitted to the Court without the introduction of evidence and on briefs to be submitted. The briefs have been filed herein and have been considered by the Court. The Court has awaited the decision of the Court of Appeals on the three-judge ruling before proceeding to the merits of the case.

Plaintiff's attack on the Urban Renewal legislation of the State of Oklahoma as being unconstitutional is not supported by the cases. The United States Supreme Court in *Berman* v. *Parker,* 348 U.S. 26, 99 L.Ed 27, 75 S.Ct. 98 (1954), upheld the validity and constitutionality of Urban Renewal legislation. Plaintiff's specific complaint that the

[APPENDIX]

Oklahoma legislation is unconstitutional in that it denies him the equal protection of the laws because he and other citizens of the City of Oklahoma City do not have the right to vote on the exercise of Urban Renewal Authority in their community, whereas citizens of smaller cities are permitted to vote on such exercise in their community, has also been the subject of court adjudication unfavorable to the Plaintiff. *City of Kansas City* v. *Robb*, 332 P.2d 520 (Kans. 1958); *Isaacs* v. *Oklahoma City*, 437 P.2d 229 (Okl. 1967), at p. 236, cert. denied 389 U.S. 825, 19 L.Ed.2d 79, 88 S.Ct. 63 (1967). Also see *Kramer* v. *Union Free School District*, Note 7, 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969). The Court finds and concludes that the classification made by the Oklahoma legislature between the larger and smaller cities is a natural and genuine one, having a substantial and reasonable relation to the subject matter involved. It is common knowledge that populous cities are subject to more slum and blighted areas which are injurious to the health and welfare of their inhabitants, whereas, differences of opinion may exist in smaller cities as to whether slum and blighted areas are present. Thus, population is a legitimate ground for classification and differentiation with respect to holding elections regarding the exercise of Urban Renewal power and authority. The Court finds that the classification is not arbitrary but is genuine and reasonable.

Plaintiff's action should, therefore, be dismissed as it fails to state a claim upon which relief may be granted. Counsel for Defendants will prepare an appropriate judgment of dismissal for the signature of the Court and entry herein.

Dated this 11th day of December, 1970.

s/ Fred Daugherty
Fred Daugherty
United States District Judge